



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Daley Corporation-California Commercial Asphalt Corporation, J.V.

File: B-274203.2

Date: December 9, 1996

Davide Golia, Esq., Marks & Golia, LLP, for the protester.
Frank K. Kotarski, Esq., Christopher M. Bellomy, Esq., and George N. Brezna, Esq.,
Department of the Navy, for the agency.
Linda C. Glass, Esq., and Paul I. Lieberman, Esq., Office of the General Counsel,
GAO, participated in the preparation of the decision.

DIGEST

Agency improperly rejected bid on the basis of minor irregularities in power of attorney to execute bid bond where the attached power of attorney certificate was properly executed by the surety's corporate officers, and the certificate was embossed with the surety's original seal.

DECISION

Daley Corporation-California Commercial Asphalt Corporation, J.V. (Daley-CCAC) protests the rejection of its bid as nonresponsive for lack of a valid bid bond under invitation for bids (IFB) No. N68711-94-B-1587, issued by the Department of the Navy for certain construction at the Marine Corps Air Station at Miramar, California. The protester contends that the agency unreasonably concluded that Daley-CCAC's bid bond was defective.

We sustain the protest.

The IFB, which required submission of a bid guarantee, was issued on July 1, 1996. At bid opening on August 1, the low bid was rejected as nonresponsive because it failed to offer the required 120-day bid acceptance period. Daley-CCAC, the second low bidder, included in its bid package a bid guarantee in the form of a bid bond, dated July 30, 1996, from American Motorists Insurance Company (AMIC) signed by K. R. Viodes as attorney-in-fact. Accompanying the bid bond was a power of attorney, dated July 30, 1996, appointing K. R. Viodes as AMIC's attorney-in-fact. The power of attorney is certified by the facsimile signature of W.A. Grauzas, Secretary, and executed by the facsimile signature of J. S. Kemper III, Executive Vice President.

On the back of the power of attorney is an undated notary certification that states in part:

"I, Irene Klewer, a Notary Public, do hereby certify that J.S. Kemper, III and F.C. McCullough personally known to me to be the same persons whose names are respectively as Exec. Vice President and Secretary of the American Motorists Insurance Company, a Corporation of the State of Illinois, subscribed to the foregoing instrument."

Beneath the notary certification was a certification dated July 30, 1996, and executed by N. J. Zarada as secretary which states in part:

"I, N.J. Zarada, Secretary of the American Motorists Insurance Company, do hereby certify that the attached Power of Attorney dated July 26, 1993 on behalf of the person(s) as listed on the reverse side is a true and correct copy and that the same has been in full force and effect since the date thereof and is in full force and effect on the date of this certificate; and I do further certify that the said J.S. Kemper, III and W.A. Grauzas who executed the Power of Attorney as Exec. Vice President and Secretary respectively were on the date of the execution of the attached Power of Attorney the duly elected Exec. Vice President and Secretary of the American Motorists Insurance Company."

The Navy, after examining the power of attorney, concluded that it contained numerous irregularities that raised uncertainties regarding the validity of the power of attorney, and therefore the validity of the bond itself. Specifically, the Navy considered the power of attorney appointment attested to by a facsimile signature of W. A. Grauzas as Corporate Secretary and dated July 30, 1996, to be inconsistent with the certification on the same date by N. J. Zarada, also as secretary. The Navy also noted that the undated notary certification, which referred to F.C. McCullough as secretary, and the July 30, 1996 certification signed by N. J. Zarada, as secretary, that the power of attorney was in full force which referred to a power of attorney dated July 26, 1993 added further uncertainty. On the basis of these perceived discrepancies, the Navy rejected the protester's bid as nonresponsive.

A bid guarantee is a form of security that assures the government that a bidder will not withdraw its bid within the period specified for acceptance and, if required, will execute a written contract and furnish required performance and payment bonds. Federal Acquisition Regulation (FAR) § 28.001. The bid guarantee secures the surety's liability to the government, thereby providing funds to cover the excess costs of awarding to the next eligible bidder in the event that the awardee fails to

fulfill these obligations. A.W. and Assocs., Inc., 69 Comp. Gen. 737 (1990), 90-2 CPD ¶ 254.

When required by a solicitation, a bid guarantee is a material part of the bid, and a valid guarantee must be furnished with the bid in order for it to be responsive. A.D. Roe Co., Inc., 54 Comp. Gen. 271 (1974), 74-2 CPD ¶ 194. Where a bid bond is submitted as a bid guarantee and the bond is accompanied by a power of attorney that on its face does not establish unequivocally that the person signing was authorized to bind the surety, the bid must generally be rejected as nonresponsive. Quantum Constr., Inc., B-255049, Dec. 1, 1993, 93-2 CPD ¶ 304. This is so because a power of attorney authorizes the agent to act for the principal and only a valid power of attorney would indicate that the surety expressly agreed to be bound to pay the bond signed by the attorney-in-fact. See Fred Winegar, B-243557, Aug. 1, 1991, 91-2 CPD ¶ 111.

Accordingly, a bid must be rejected as nonresponsive where there is some ambiguity about the authority of the person signing the bond on behalf of the surety. Thus, the issue here is whether the bid documents provided any reasonable basis to doubt the validity of the power of attorney which is executed by a facsimile signature. Where there is evidence submitted with the bid which unequivocally demonstrates the surety's intent to be bound by a facsimile or photocopy version, such a bid bond is acceptable. See Services Alliance Sys., Inc., B-255361, Feb. 22, 1994, 94-1 CPD ¶ 137.

In this case, the power of attorney submitted by Daley-CCAC with its bid bond is comprised of three parts. The first part authorizes the named individual to act as attorney-in-fact for the surety; it is attested to by a secretary and signed by an executive vice president of the surety and affixed with a raised original corporate seal. The second part is a notary public certification of the corporate officers' signatures on the first part. The third part, captioned "CERTIFICATION," is signed by another secretary of the surety who certifies that the "attached" power of attorney dated July 26, 1993, is a full, true, and correct copy and is in full force and effect.

The agency views the naming of three different secretaries in different parts of the power of attorney as an irregularity that casts doubt upon the validity of the secretarial certifications and, therefore, the validity of the power of attorney. We think the agency's concern is misplaced. While three different secretaries were identified in different sections of the power of attorney, N. J. Zarada certified that he was the secretary on July 30, 1996. Moreover, the agency had information in its

possession that identified N. J. Zarada as AMIC's current secretary.¹ Thus, there should have been no question that N. J. Zarada was the Secretary at the time the bond was executed. Zarada certified that W. A. Grauzas and J.S. Kemper, III were the Secretary and Executive Vice President on the date of execution of the power of attorney. The certification also refers to an "attached" July 26, 1993 power of attorney. Since the "attached" power of attorney was essentially a reproduced form that had the date of July 30, 1996 typed in, it appears that the typist simply made a clerical error, which would explain why both Grauzas and Zarada were identified as the secretary as of the same date. Of most importance, however, the Zarada certification serves to validate the authenticity and current validity of the Viodes appointment since Zarada, as the current secretary, certified that K.R. Viodes was properly appointed attorney-in-fact on July 26, 1993, and that this appointment was still in effect.

Further, Zarada's certification is accompanied by an authorized facsimile seal. The power of attorney specifically provides that the surety fully intended to be bound by the facsimile signatures of its corporate officers, and by a facsimile seal. In addition, the raised corporate seal was affixed to the document. The corporate seal establishes prima facie that an instrument is the duly authorized act of the corporation and is not easily overcome. Fletcher Cyc. Corp., §§ 2470-2473 (Perm. Ed.); 18A Am. Jur. 2d 214, Corporations Sec. 304; H.G. Hill Co. v. Taylor, 232 Ala. 471, 168 So. 693 (1936).

While as a general rule a contracting officer should not accept a bid bond unless it is clear that the surety on the bond is obligated, Quantum Constr., Inc., supra, in light of the certification by the current secretary, we fail to see as a matter of law how the surety would not be bound to the obligations of the bond. In these circumstances, the agency's determination reflects concern with technical deficiencies rather than any that would call into question whether the surety was actually bound. See Hancon Assocs.--Recon., B-209446.2, Apr. 29, 1983, 83-1 CPD ¶ 460.

¹The agency provided what it considers to be a properly executed AMIC power of attorney with the agency report. This power of attorney was certified and executed by the facsimile signature of W. A. Grauzas, Secretary, and J. S. Kemper III, Executive Vice President, and was signed by N. J. Zarada, Secretary, in July 1996. An agency should consider evidence, such as previously submitted bid bonds which are in its possession at the time of bid opening, which serve to establish the authority of the individual executing a bid bond. Danish Arctic Contractors, B-225807, June 12, 1987, 87-1 CPD ¶ 590.

Accordingly, we conclude that the protester's bid should not have been rejected, and we sustain the protest. Contract award has been withheld pending resolution of this protest. We recommend that award be made to the protester if it is otherwise eligible. We also recommend that the protester be reimbursed its costs of filing and pursuing its protest. Bid Protest Regulations, section 21.8(d)(1), 61 Fed. Reg. 39,039, 39,046, (July 26, 1996) (to be codified at 4 C.F.R. § 21.8(d)(1)). The protester should submit its certified claim for costs to the contracting agency within 60 days of receiving this decision. Section 21.8(f)(1), 61 Fed. Reg. supra.

The protest is sustained.

Comptroller General
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